IN THE SUPREME COURT

Appeal from the Court of Appeals
Honorable Christopher M. Murray, P.J.

ERIC A. BRAVERMAN, Successor Personal Representative of the Estate of Patricia Swann, Deceased,

Plaintiff-Appellee,

v.

GARDEN CITY HOSPITAL a/k/a GARDEN CITY HOSPITAL, OSTEOPATHIC,

Defendants,

and

JOHN R. SCHAIRER, D.O., GARY YASHINSKY, M.D., ABHINAV RAINA, M.D., and PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC.,

Defendants-Appellants.
_____/

Supreme Court Nos. 134445, 134446

BRIEF OF AMICUS CURIAE MICHIGAN DEFENSE TRIAL COUNSEL

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Whether, before commencing an action alleging medical malpractice, a successor personal representative is required to provide a new notice of intent and cannot rely on the notice sent by a predecessor personal representative?

INTEREST OF AMICUS CURIAE

Michigan Defense Trial Counsel, Inc. (MDTC) is an association of Michigan attorneys representing the defense in civil litigation. In its September 26, 2007 order granting leave to appeal in this case, this Court invited certain organizations, including the MDTC, "to file briefs amicus curiae" (see 09/26/07 order). At the Court's invitation, the MDTC now does so.

STATEMENT OF FACTS

Amicus curiae, Michigan Defense Trial Counsel, Inc., relies upon the Statement of Facts of defendants-appellants, John R. Schairer, D.O., Gary Yashinsky, M.D., Abhinav Raina, M.D., and Providence Hospital and Medical Centers, Inc.

STANDARD OF REVIEW

MCR 2.116(C)(7) empowers the trial court to grant summary disposition based on the statute of limitations. In the absence of disputed facts, the question whether a plaintiff's cause of action is barred by the statute of limitations is a question of law to be determined by the court. Moll v Abbott Laboratories, 444 Mich 1, 26; 506 NW2d 816 (1993). Summary disposition for the absence of a genuine issue of material fact pursuant to MCR 2.116(C)(10) must be granted if the evidence in support and in opposition to the motion shows that there is no genuine issue of material fact to resolve at trial. Shallal v Catholic Social Services, 455 Mich 604, 609; 566 NW2d 571 (1997).

This Court reviews a summary disposition determination de novo as a matter of law. Weymers v Khera, 454 Mich 639, 647; 563 NW2d 647 (1997). Issues of statutory construction are also reviewed de novo. Herald Co v City of Bay City, 463 Mich 111, 117; 614 NW2d 873 (2000).

ARGUMENTS

I. A successor personal representative is precluded from initiating a new two-year saving period under MCL 600.5852 where the estate has had the benefit of a full two-year period in which to file suit.

An estate should be afforded a single two-year period in which to file suit. Such allows the estate a reasonable time to pursue any claims on behalf of the estate and is consistent with the plain language of the death saving provision, MCL 600.5852. Even if a prior personal representative does not file suit, after an individual has served for a full two years as personal representative and/or the estate has been represented for a full two years, the appointment of a successor personal representative should not operate to revive the expired two-year death saving provision. Such an interpretation would render a portion of the death saving provision nugatory and would be inconsistent with applicable provisions of the Estates and Protected Individuals Code.

A. Introduction to applicable statutes and case law.

In general, the statute of limitations applicable to a wrongful death action is the statute of limitations applicable to the underlying claim. See Hawkins v Regional Medical Laboratories, PC, 415 Mich 420, 436; 329 NW2d 729 (1982). The plaintiff's claims in the instant appeal are premised on allegations of medical malpractice, which the plaintiff claims caused the death of the decedent. See Braverman v Garden City Hosp, 272 Mich App 72, 75; 724 NW2d 285 (2006).

In an action alleging medical malpractice, a plaintiff must file suit within two years after the alleged negligent act or omission.[1] See MCL 600.5805(6), MCL 600.5838(2) and MCL 600.5838a. Alternatively, if the alleged injured person dies before the expiration of the statute of limitations or within 30 days thereafter, the personal representative of the estate may commence an action within two years after letters of authority are issued. The suit must nonetheless be brought within 3 years of when the statute of limitations expired. MCL 600.5852 provides:

> If a person dies before the period of limitations has run or within 30

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[1] There do not appear to be any allegations that the 6 month discovery statute of limitations applies to this case.

> days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

In addition, at least 182 days prior to commencing an action alleging medical malpractice against a health professional or health facility, a plaintiff must provide the professional or facility with a written "notice of intent."[2] MCL 600.2912b. If the statute of limitations or statute of repose would expire during the pre-suit notice period, the statute of limitations or statute of repose can be tolled for 182 days. MCL 600.5856. However, the death saving provision cannot be tolled by the notice of intent. See Waltz v Wyse, 469 Mich 642; 677 NW2d 813 (2004).

At issue in the instant appeal is the interpretation of the time available under the death saving provision in which to file suit and the applicability of the notice of intent requirement to a successor personal representative appointed to represent the estate of a deceased individual.

B. The complaint in Braverman was not timely filed within the applicable statute of limitation or within two years after the original personal representative was appointed.

It is undisputed that the Braverman case presents a claim of medical malpractice to which a two-year statute of limitations applies. MCL 600.5805(6). It is similarly undisputed that the action was not commenced within the medical malpractice statute of limitations. 272 Mich App at 75. The plaintiff alleges medical malpractice involving several health professionals, occurring on various dates from April 19, 2001 through November 29, 2001. Thus, the two year medical malpractice statute of limitations expired at the very latest on November 29, 2003.[3] However, the notice of intent was sent on July 8, 2004 and complaint was filed January 25, 2005, long after the statute of limitations had expired. 272 Mich App at 75 n 4.

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[2] The 182 period may be shortened under various circumstances which are not relevant to the instant case. See MCL 600.2912b(3), (8) and (9).

[3] The applicable two-year statute of limitations would begin to run on the date of each negligent act or omission. See McKiney v Clayman, 237 Mich App 198; 602 NW2d 612 (1999).

As the action was not timely commenced within the medical malpractice statute of limitations, plaintiff must rely on the time period provided in the death saving provision. However, the action was also not filed within two years after letters of authority were issued to the original personal representative.

Pursuant to the death saving provision, MCL 600.5852, suit must be commenced within two years after letters of authority are issued. In Braverman, letters of authority were issued to the original personal representative, Grace Fler, on October 29, 2002. 272 Mich App at 75. Thus, in order to timely commence an action under the death saving provision, the complaint should have been filed before October 29, 2004. However, the complaint was not filed until January 25, 2005. Thus, if Ms. Fler had continued to serve as personal representative, no action could have been filed on behalf of the estate as any such action would indisputably be time-barred.

As Ms. Fler, the original personal representative, could not have filed a complaint, the successor personal representative and present plaintiff, Eric Braverman (who replaced Ms. Fler on August 18, 2004), must argue that the death saving provision recommenced upon his appointment. However, amicus curiae MDTC submits that such a construction would render a portion of MCL 600.5852 completely without effect and, thus, is inconsistent with the statute itself.

C. An interpretation allowing multiple two-year periods under MCL 600.5852 would render a portion of the statute nugatory, contrary to established rules of statutory construction.

"Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." Jenkins v Patel, 471 Mich 158, 167; 684 NW2d 346 (2004), *quoting* State Farm Fire & Cas Co v Old Republic Ins Co, 466 Mich 142, 146; 644 NW2d 715 (2002). An interpretation of MCL 600.5852 that limits an estate to one two-year period in which to file suit gives effect and meaning to each provision contained in the statute. Conversely, an interpretation permitting an unlimited number of saving periods, capped only by the three year "ceiling", would essentially render a portion of MCL 600.5852 nugatory and meaningless, contrary to these established rules of statutory construction. See In re MCI

Telecommunications Complaint, 460 Mich 396, 414; 596 NW2d 164 (1999) and People v Warren, 462 Mich 415, 429 n 24; 615 NW2d 691 (2000). Again, MCL 600.5852 provides:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

The statute contains two time restrictions, requiring suit to be brought within two years after letters of authority are issued and within three years after the period of limitations has run. In MCL 600.5852, the Legislature could have simply afforded the estate of a deceased person a blanket period of three years from the expiration of the statute of limitations in which to commence a death action (effectively allowing in a medical malpractice action a five year period in which to file suit). However, the Legislature did not do so. Rather, in MCL 600.5852, the Legislature specifically imposed a two-year restriction, requiring an action to be commenced "within 2 years after letters of authority are issued." Where a personal representative has already served a full two years and/or where the estate has had the benefit of a full two years of representation, allowing additional time for a successor personal representative to file suit would render the two-year period completely meaningless. Specifically, under such an interpretation, in all cases alleging a claim of medical malpractice/wrongful death, an estate would have a blanket period of five years (three years from the expiration of the statute of limitations) in which to file suit. Any restriction imposed by the two-year period referenced in MCL 600.5852 could be avoided at the option of the plaintiff, simply through appointment of a successor personal representative. The two-year restriction could even be avoided by the same personal representative (without the necessity of appointing a successor), simply through the issuance of new letters of authority to the same personal representative.[4] Such an

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[4] However, allowing the same personal representative to obtain new letters of authority to extend the death saving provision would, of course, be contrary to this Court's prior decision in (continued...)

interpretation would entirely remove the two-year restriction and is, thus, contrary to the plain language of the statute.

An interpretation of MCL 600.5852 which limits the estate to a single two-year period gives meaning to each word and phrase contained in the statute, including the two and three-year periods referenced in the statute. The Legislature has imposed a two-year restriction on the available time in which to file suit. Where the estate has been represented for a full two years, the estate has had a reasonable time in which to file suit. An extension of this time through the appointment of a successor personal representative is contrary to the plain language of the statute.

D. Provisions contained in the Estate and Protected Individuals Code support the conclusion that the death saving provision should be interpreted to allow a single two-year period in which to file suit.

The conclusion that the Michigan Legislature intended to allow only one two-year period under MCL 600.5852 in which to file suit is further supported by provisions contained in the Estate and Protected Individuals Code (EPIC), which provide that a successor personal representative is essentially placed in the same position as the original personal representative. In pertinent part, MCL 700.3613 provides:

> The appointment of a personal representative to succeed a personal representative whose appointment is terminated is governed by parts 3 and 4 of this article. After appointment and qualification, a successor personal representative must be substituted in all actions and proceedings in which the former personal representative was a party. A notice, process, or claim that was given or served upon the terminated personal representative need not be given to or served upon the successor personal representative in order to preserve a position or right the person that gave the notice or filed the claim may have obtained or preserved with reference to the former personal representative. **Except as the court otherwise orders, the successor personal representative has the powers and duties in respect to the continued administration that the former personal representative would have had if the appointment had not been terminated.** [Emphasis added.]

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[4](...continued)
Lindsey v Harper Hospital, 455 Mich 56, 66; 564 NW2d 861 (1997) wherein this Court held that the two-year period referenced in MCL 600.5852 allowed the estate a "reasonable time" in which to file suit.

This statute is consistent with MCL 700.3716, which also provides that a successor personal representative has the "same powers and duties" as the original personal representative:

> **A successor personal representative has the same powers and duties as the original personal representative to complete the administration of the estate**, as expeditiously as possible, but the successor personal representative shall not exercise a power expressly made personal to the personal representative named in the will. [Emphasis added.]

Where a successor personal representative merely assumes the "same powers and duties" as the original personal representative, MCL 600.5852 can only be construed to allow one two-year period in which to file suit. In this case, the original personal representative, Ms. Fler, did not have the "power" to file a complaint as the same could not be filed before the two-year period following her appointment had expired. The successor personal representative, Mr. Braverman, is not granted any powers greater than had been possessed by the original personal representative. Thus, where the original personal representative was barred from filing a complaint after a full two-year period had passed, the successor personal representative is similarly barred.

In addition, it should be noted that the personal representative for the estate has the right and, indeed, the duty, to act "expeditiously" on behalf of the estate. In pertinent part, MCL 700.3703(1) provides:

> A personal representative is a fiduciary who shall observe the standard of care applicable to a trustee as described by section 7302 [MCL 700.7302]. A personal representative is under a duty to settle and distribute the decedent's estate in accordance with the terms of a probated and effective will and this act, and as expeditiously and efficiently as is consistent with the best interests of the estate. The personal representative shall use the authority conferred by this act, the terms of the will, if any, and an order in a proceeding to which the personal representative is party for the best interests of claimants whose claims have been allowed and of successors to the estate.

See also MCL 700.3701(x), providing that the personal representative may "[p]rosecute or defend a claim or proceeding in any jurisdiction for the protection of the estate and of the personal representative in the performance of the personal representative's duties."

Interpreting MCL 600.5852 to allow for a single two-year period in which to file suit is

consistent with each of these statutes, requiring the personal representative to timely act on behalf of the estate and placing any successor personal representative in the same position as the prior personal representative.

E. This Court's decision in Eggleston v Bio-Medical Applications of Detroit does not compel an interpretation of MCL 600.5852 which would allow multiple two-year periods in which to file suit.

This Court's decision in Eggleston v Bio-Medical Applications of Detroit, Inc, 468 Mich 29; 658 NW2d 139 (2003), should not be interpreted to allow the estate in a wrongful death action multiple time periods under the death saving provision in which to file suit. Rather, it should be considered significant that, when the successor personal representative was appointed in Eggleston, the decedent's estate had only been represented for a short period of time. The estate was not afforded a "reasonable time" in which to file suit. Specifically, the original personal representative in Eggleston was appointed on April 4, 1997, but died on August 20, 1997, approximately 4½ months after his appointment, apparently without having taken any action to pursue a lawsuit on behalf of the estate. A successor personal representative was then appointed on December 8, 1998 and this successor filed the wrongful death complaint six months after his appointment. This Court held that where the complaint was filed within two years after the successor personal representative was appointed, such was timely and, thus, not barred by the statute of limitations. Notably, when the successor personal representative was appointed in Eggleston, the original personal representative had served for only 4½ months and had taken no action on behalf of the estate before his death. Thus, when the successor personal representative in Eggleston stepped into the shoes of the original personal representative, the successor was not faced with an expired death saving provision. Further, the total time that the estate was represented, adding the time of the original and successor personal representatives' appointments, was only a period of 10½ months.

Thus, the distinction between the Eggleston case and the situation presented in Braverman is that, here, the original personal representative failed to timely assert a claim against the defendants, despite having the opportunity and, indeed, the responsibility to do so. In contrast, in Eggleston, the

estate did not have the benefit of representation during a full two-year period.

The language employed by this Court in Eggleston reinforces the conclusion that MCL 600.5852 should be interpreted to allow only one two-year period in which to file suit, not multiple periods.

> [T]he statutory language simply provides that **the** two-year grace period is measured from the issuance of letters of authority. [Id. at 30, emphasis added.]
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> * * *
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> The statute does not provide that **the** two-year period is measured from the date letters of authority are issued to the initial personal representative. [Id. at 33, emphasis added.]

In interpreting MCL 600.5852 in Eggleston, this Court found it significant that the Court of Appeals had misread the death saving statute by inserting the word "the" before "letters of authority." If the absence of the word "the" before "letters of authority" is significant, the presence of the word "the" before "personal representative", and this Court's use of the word "the" to describe the two-year grace period should also be considered significant in interpreting the meaning of the statute.

In the instant case, "the" two year period began on October 29, 2002 and expired on October 29, 2004. A complaint was filed on January 25, 2005, however, by that time, "the" two year period in which to commence an action under MCL 600.5852 had expired. Thus, the case was not timely filed within the two-year period following the date of the alleged medical malpractice nor within the two year period following the appointment of the original personal representative. Therefore, dismissal on statute of limitations grounds is appropriate.

F. The conclusion that the death saving period should not recommence upon appointment of a successor personal representative is supported by several Court of Appeals decisions.

In several published opinions, the Court of Appeals has correctly concluded that MCL 600.5852 should *not* be interpreted to afford multiple periods in which to file suit under the death saving provision. The rationale articulated by the Court of Appeals should be adopted by this Court.

In McLean v McElhaney, 269 Mich App 196; 711 NW2d 775 (2005), rev'd on other grounds Mullins v St. Joseph Mercy Hosp, ___ Mich ___; 741 NW2d 300 (2007), the Court of Appeals held that the estate's claims were barred after the estate had been represented for a full two years. The McLean plaintiff's complaint alleging medical malpractice/wrongful death had not been timely filed within the applicable statute of limitations nor within two years after the plaintiff/personal representative had been appointed. The Court of Appeals held that dismissal was, thus, proper. The plaintiff argued that, pursuant to Eggleston, a successor personal representative could be appointed to timely file an action within two years of the successor's appointment. The Court of Appeals disagreed, finding that the failure of the original personal representative in McLean to timely act on behalf of the estate precluded the action. The Court of Appeals further found it significant that the estate in Eggleston had only been represented for a combined period of only 10½ months and that neither the original nor successor personal representative had the opportunity to represent the estate for a full two-year period.

> Plaintiffs rely on Eggleston v Bio-Medical Applications of Detroit, Inc, 468 Mich 29, 658 NW2d 139 (2003), for their assertion that a successor personal representative would be able to timely file a complaint in this case. In Eggleston, our Supreme Court held that a successor personal representative has two years after appointment to file an action on behalf of an estate under the wrongful death saving statute. Id. at 30, 658 NW2d 139. However, the facts of the present case are distinguishable. In Eggleston, the decedent's widower "was appointed temporary personal representative and issued letters of authority on April 4, 1997. He died on August 20, 1997." Id. at 31, 658 NW2d 139. The decedent's son was appointed her successor personal representative on December 8, 1998, and he filed a medical malpractice complaint on June 9, 1999. Id. Thus, the estate of the decedent was represented for a total of approximately 10 ½ months when the complaint was filed, and neither the initial nor the successor representative represented the estate for the full two years available to him under the wrongful death saving statute. Contrarily, plaintiffs were afforded the full two years permitted under the wrongful death saving statute to file their complaint, but failed to do so. Moreover, plaintiffs' failure was not due to the untimely demise of a predecessor representative, but to their own negligence in calculating the proper time for filing the complaint. Accordingly, we conclude that plaintiffs are not entitled to relief under Eggleston. [269 Mich App at 201-202.]

Thus, the McLean Court held that when an estate has been represented for a full two years,

the death saving provision has expired and a successor personal representative is precluded from initiating an action on behalf of the estate.

Similarly, the Court of Appeals in Farley v Advanced Cardiovascular Health Specialists, PC, 266 Mich App 566; 703 NW2d 115 (2005), lv den 474 Mich 1020; 708 NW2d 385 (2006), rec den 474 Mich 1132; 712 NW2d 716 (2006) noted the difference between the two and three year periods in MCL 600.5852, and rejected the plaintiff's argument that, although the complaint was not filed within two years of the personal representative's appointment, the suit was timely because the three year "ceiling" contained in MCL 600.5852 had not yet been reached when the plaintiff filed suit. The Court of Appeals held that the three year period may shorten the two year period, but does not lengthen it. Rather, the claim was time barred where the same was not filed within two years of the appointment of the original personal representative, regardless of the appointment of a successor and regardless of the time remaining before the "ceiling" was reached.

> We note that the three-year ceiling in this provision does not establish an independent period during which a personal representative may bring suit. Specifically, **it does not authorize a personal representative to file suit at any time within three years after the period of limitations has run.** Rather, the three-year ceiling limits the two-year saving period to those cases brought within three years of when the malpractice limitations period expired. As a result, while the three-year ceiling can *shorten* the two-year window during which a personal representative may file suit, it cannot *lengthen* it. [Id. at 573, n 16, emphasis in original and added.]

Thus, it was "irrelevant" that the three year "ceiling" had not yet been reached.

> [T]he three year ceiling in the wrongful death savings provision is not an independent period in which to file suit; it is only a limitation on the two-year saving provision itself. Therefore, the fact that the three year ceiling was not yet reached when Farley filed suit is irrelevant. [Id. at 575.]

Thus, in Farley, the Court of Appeals concluded that the claim itself was barred where the personal representative did not timely commence an action. In Farley it was "irrelevant" that the three year ceiling has not yet been reached and, thus, dismissal was proper. So too, in the instant case, the estate's potential claims against defendants are time-barred since the estate was represented for a full two years and failed to timely file an action against the defendants within that time. Under

such circumstances, the Court of Appeals in Farley correctly held that dismissal was proper, regardless of whether additional time remained before the three year ceiling was reached. The rationale articulated in McLean and Farley, limiting the estate to one two-year period, should be adopted by this Court.

II. Before commencing an action alleging medical malpractice, a successor personal representative is required to provide a new notice of intent and cannot rely on the notice sent by a predecessor personal representative.

Before commencing an action alleging medical malpractice, the plaintiff is required by statute to provide a presuit notice of intent to the health professionals or health facilities to be named in the complaint. Where an individual other than the same individual who served the notice of intent later files suit, the notice of intent requirement has not been fulfilled. As set forth below, the statute plainly requires the same person who files suit to also have served a presuit notice. Thus, in an action which also asserts a wrongful death claim, if a new personal representative is appointed, that personal representative must provide his or her own notice of intent. Such a requirement is consistent with the goal of promoting settlement and reducing litigation costs by informing the defendant of the identity of the individual who is representing the estate and of that individual's intention to pursue a claim on behalf of the estate.

A. Applying accepted principles of statutory construction, the notice of intent statute requires that the individual who commences a medical malpractice action must be the same person who provided a notice of intent.

In construing statutes, this Court has repeatedly held that an unambiguous statute should be enforced as written. See People v McIntire, 461 Mich 147, 153; 599 NW2d 102 (1999); Roberts v Mecosta County General Hosp, 466 Mich 57, 63; 642 NW2d 663 (2002). Further, this Court has stated that, in construing the meaning of a statute, it is important to examine the words used by the Legislature.

> Because the Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis must begin with the wording of the statute itself. Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence. The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another. Where the language of the statute is clear and unambiguous, the Court must follow it. [Robinson v City of Detroit, 462 Mich 439, 459; 613 NW2d 307 (2000), citations omitted.]

The statute at issue here, Michigan's notice of intent statute, imposes a requirement that the

individual commencing a medical malpractice action first provide a presuit notice. Specifically, pursuant to MCL 600.2912b, "a person" may not commence a medical malpractice action unless "the person" has first provided a presuit notice of intent. In pertinent part, MCL 600.2912b provides:

> (1) Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

In this statute, the Legislature has specifically used the term "person" to refer to the individual who is responsible for providing the notice. The Legislature has also preceded the term "person" with the term "a" in one portion of the statute and the term "the" later in the same statute. This Court has stated that the use of the definite article "the" denotes a singular. Such was the conclusion in Robinson, supra, wherein this Court considered the Legislature's use of the term "the" in the context of the governmental immunity statute, which potentially imposes liability if the actions of a governmental employee are "the proximate cause" of the injury. MCL 691.1407(2). This Court held that "[t]he Legislature's use of the definite article 'the' clearly evinces an intent to focus on one cause." 462 Mich at 458-459. Quoting with approval from the dissenting opinion in Hagerman v Gencorp Automotive, 457 Mich 720, 753-754; 579 NW2d 347 (1998), this Court also noted that there was a difference in the use of "the" and "a" in a particular statute and that the Legislature would be aware of such a distinction in choosing its language.

> Traditionally in our law, to say nothing of our classrooms, we have recognized the difference between "the" and "a." "The" is defined as "definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an)...." *Random House Webster's College Dictionary,* p. 1382. Further, we must follow these distinctions between "a" and "the" as the Legislature has directed that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language...." MCL 8.3a; MSA 2.212(1). Moreover, there is no indication that the words "the" and "a" in common usage meant something different at the time this statute was enacted.... [462 Mich at 461-462.]

Applying these rules of statutory construction, and in consideration of the particular language used by the Legislature in MCL 600.2912b(1), it is evident that the notice statute imposes a

requirement that before a (or any) person commences a medical malpractice action, that same person must first provide a notice of intent.

Such was the conclusion reached by the Court of Appeals in Verbrugghe v Select Spec Hosp, 270 Mich App 383; 715 NW2d 72 (2006), wherein the court held that, before filing a second action, the successor personal representative was required to provide a new notice of intent in her own name.[5]

> The trial court's final reason for dismissal was that plaintiff's complaint was subject to dismissal because the successor personal representative failed to serve a notice of intent on defendants, citing MCL 600.2912b(1) and Halton v Fawcett, 259 Mich App 699, 704; 675 NW2d 880 (2003). The trial court and defendants are correct in this last assertion, as plaintiff herself was required to file a notice of intent before commencing this lawsuit. [Id. at 397.]

The Verbrugghe Court referenced the Court of Appeals prior decision in Halton, a wrongful death/medical malpractice action wherein the court had held that a notice of intent was not defective where the same had been sent by "the person" who was later appointed the personal representative for the estate.[6] In reaching this conclusion, the Court of Appeals in Halton focused on the use of the definitive article "the" in the notice statute to describe the individual charged with the requirement to provide notice.

> With the use of the definite article "the" with the second occurrence of the word "person" in MCL 600.2912b(1), it is clear that the statute requires that *the* person commencing a medical malpractice action be the person who previously served a notice of intent on the defendant. [Id. at 701-702, emphasis in original.]

The Halton Court also analyzed the use of the word "person" in conjunction with "the" to

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[5] This portion of the Verbrugghe opinion was vacated and replaced by the opinion issued by the special conflict panel convened by the Court of Appeals in this case, which opinion is at issue in this appeal. See Braverman v Garden City Hosp, 275 Mich App 705; 740 NW2d 744 (2007).

[6] After initially holding the application for leave to appeal in Halton in abeyance pending the decision in Waltz v Wyse, this Court ultimately denied leave to appeal in Halton for the reason that this Court "was not persuaded that the question presented should be reviewed by this Court. See Halton v Fawcett, 471 Mich 912; 688 NW2d 287 (2004).

describe the individual charged with providing notice and concluded that the individual who provides notice and the individual who files suit must be the same human being.

> [T]he word "person" refers to a human being, whether in their individual or representative capacity. Plaintiff is the same human being who is responsible for the notice of intent and the filing of the lawsuit. Therefore, the statutory requirement that the person who files the suit must have previously given notice of intent is satisfied. [Id. at 704.]

The Court of Appeals in Verbrugghe and Halton correctly analyzed the notice of intent statute to require the same individual who files suit to have previously provided a notice of intent. Such is consistent with the plain language of the notice statute.

B. Assuming that the purpose of the notice statute is to promote settlement, the purpose is served if a successor personal representative is required to file his or her own notice of intent.

The successor personal representative in Braverman indisputably did not provide a new notice of intent before filing a complaint. In failing to provide a new notice of intent, the Braverman plaintiff/successor personal representative completely frustrated the purpose of MCL 600.2912b. As stated by the Court of Appeals in Neal v Oakwood Hospital Corp, 226 Mich App 701; 575 NW2d 68 (1997), the purpose of the presuit notice of intent is to "promote settlement without the need for formal litigation and reduce the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims that might otherwise be precluded from recovery because of litigation costs." Id. at 705.[7]

Viewed in the context of the notice of intent's purpose, the requirement that a successor personal representative provide a new notice of intent is reasonable and consistent with the statutory language. Where the original personal representative for the estate provides a notice of intent but

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[7] This Court in Roberts v Mecosta County General Hosp, 470 Mich 679, 700 n 17; 684 NW2d 711 (2004) declined to specifically state that the purpose of the notice of intent requirement was to promote settlement and avoid the need for formal litigation. However, in Roberts, this Court stated that, assuming settlement was "a primary objective" of the statute, that the same would be served "by providing a defendant with a clear understanding of the plaintiff's allegations."

never files suit, the potential defendant named in the notice would reasonably conclude that the potential claim will not be pursued further. Where a defendant is not advised that a complaint will be filed (or even that a new personal representative has been appointed), the purpose of promoting settlement is completely frustrated. There can be no possibility of settlement where a defendant is not informed that a complaint will be filed or who will be representing an estate. Until the complaint was served, a defendant would in all likelihood have no knowledge that a successor personal representative has been appointed, no knowledge that the estate intends to file a claim and no opportunity to investigate settlement.

The timeline of events in the instant actions illustrates this point. The original personal representative, Ms. Fler, was appointed on October 29, 2002 and apparently provided a notice of intent on July 8, 2004. However, in light of this Court's then recently released decision in Waltz, supra, the defendants receiving such a notice would have known that there was no possibility that Ms. Fler could file suit before the expiration of the two-year death saving provision.[8] As any claim filed by Ms. Fler would have been time-barred, an important incentive in encouraging settlement would be removed.

Further, although the Braverman case does not present such a scenario, the need for a new notice of intent from a successor personal representative should also be required where the original personal representative files suit and the same is dismissed. Even if a dismissal is specified to be without prejudice, the plaintiff may choose not to incur the fees and costs associated with

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[8] Nor would such an action, if filed, have been saved by this Court's recent decision in Mullins, supra. In Mullins, this Court held that the Waltz, supra, decision would not apply to those causes of action which were filed after Omelenchuk v City of Warren, 461 Mich 567; 609 NW2d 177 (2000) was decided and where the two-year death saving period expired after Omelenchuk was decided and within 182 days after Waltz was decided. The Waltz decision was released on April 14, 2004 and the 182 day time period thus expired on October 13, 2004. In Braverman, the two-year death saving period would have expired on October 29, 2004, two years after Ms. Fler's appointment. Thus, after the release of Waltz, Ms. Fler had sufficient time to send a notice of intent and file a complaint consistent with the rationale articulated in Waltz, but failed to do so.

recommencing the action.[9] However, before a second complaint is served, the defendant would likely have no knowledge that a new individual has been appointed to represent the estate and no opportunity to explore settlement.

A requirement that the successor personal representative file his or her own notice of intent before commencing an action is consistent with the plain language of the statute and its purpose. Such a requirement imposes little burden on the plaintiff/successor personal representative and should be enforced by this Court.

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[9] Of course, if a dismissal with prejudice were entered, the estate would be precluded from recommencing a new action based on res judicata principles. See Washington v Sinai Hosp of Greater Detroit,478 Mich 412; 733 NW2d 755 (2007).

RELIEF REQUESTED

WHEREFORE, amicus curiae Michigan Defense Trial Counsel respectfully requests that this Honorable Court hold that the death saving provision, MCL 600.5852, is properly interpreted to allow the estate of a decedent a single two-year period in which to commence an action. Amicus curiae Michigan Defense Trial Counsel also requests that this Court reverse the conflict panel decision in Braverman v Garden City Hosp and find that a successor personal representative is required to provide a notice of intent in his or her own name prior to commencing an action alleging medical malpractice.

Respectfully submitted,

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